

1 NEW MOTOR VEHICLE BOARD
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CERTIFIED MAIL

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7 STATE OF CALIFORNIA
8
9 NEW MOTOR VEHICLE BOARD
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11 In the Matter of the Protest of
12 PORTER AUTO GROUP, L.P.,

13 Protestant,

14 v.

15 FCA US LLC,

16 Respondent.
17

**Protest Nos. PR-2534-17, PR-2535-17,
PR-2536-17, PR-2537-17, PR-2555-18,
PR-2556-18, PR-2557-18 and PR-2558-18**

**PROPOSED ORDER GRANTING
RESPONDENT'S "MOTION TO
DISMISS PROTESTS OR, IN THE
ALTERNATIVE, FOR A FINDING OF
GOOD CAUSE TO TERMINATE
BASED ON UNCONTESTED
EVIDENCE" AND OVERRULING
PROTESTS**

18
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1 This matter came on regularly for telephonic hearing on Wednesday, April 25, 2018, before
2 Anthony M. Skrocki, Administrative Law Judge ("ALJ") for the New Motor Vehicle Board ("Board").
3 Michael M. Sieving, Esq. represented Protestant. Jack O. Snyder, Jr., Esq. of Barack Ferrazzano
4 Kirschbaum & Nagelberg LLP represented Respondent.

5 **FACTUAL AND PROCEDURAL BACKGROUND**

6 1. Porter Auto Group, L.P. ("Porter" or Protestant) is a "franchisee" within the definition of
7 Vehicle Code section 331.1¹ and FCA US LLC ("FCA" or Respondent) is a "franchisor" within the
8 definition of Section 331.2. Porter and FCA are parties to four "franchises" as defined in Section 331,
9 with separate franchises for each of the Chrysler, Dodge, Jeep and RAM line-makes.

10 2. Porter sold and serviced all four line-makes at its former dealership located at 13411 Mono
11 Way, Sonora, California.

12 3. On September 5, 2017, pursuant to Section 3060, FCA issued separate but nearly identical
13 15-day notices of termination² for each of the four line-makes alleging the following:

14 Dealer is in material breach of its obligations under the Dealer Agreement with regard to
15 operations of its dealership. Dealer has been operating without sufficient net working
16 capital and/or wholesale credit and financing arrangements necessary to allow Dealer to
17 successfully conduct business in violation of the Dealer Agreement, Section 11(e).
18 Furthermore, Dealer has failed and continues to fail to conduct any dealership operations
19 for more than seven (7) consecutive days beginning, at a minimum, on August 23, 2017
20 and continuing without any dealership operations to the present. ... in violation of the
21 Dealer Agreement, Additional Terms and Provisions, Section 28 (c) (vi).

22 ...

23 On August 23, 2017, Dealer's landlord executed an eviction and assumed possession of the
24 Dealer premises and has been in continuous possession since then. As a result Dealer has
25 been and remains unable to conduct dealership operations continuously since at least
26 August 23, 2017. ... Dealer's defaults are, by definition, incurable and constitute cause

27 ¹ All statutory references are to the California Vehicle Code unless otherwise indicated.

28 ² A 15-day notice of termination may be issued only if one or more of the specified grounds outlined below exist otherwise the
franchisor may issue only a 60-day notice of termination:

(1) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be
unreasonably withheld;

(2) Misrepresentation by the franchisee in applying for the franchise;

(3) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership
law;

(4) Any unfair business practice after written warning thereof;

(5) Failure of the motor vehicle dealer to conduct its customary sales and service operations during its customary hours of
business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor
vehicle dealer is in fact going out of business, except for circumstances beyond the direct control of the motor vehicle dealer
or by order of the Department of Motor Vehicles.

1 pursuant to the terms of the Dealer Agreement, Section 28(c) and California Vehicle Code
2 for termination, effective fifteen (15) days after receipt of this Notice. (September 5, 2017,
Notice of Termination (15-day) - Chrysler Vehicle Lines (*sic*"))

3 The notices were addressed to Porter Auto Group, L.P., 13411 Mono Way, Sonora, CA 95370.

4 4. On September 22, 2017, Porter filed with the Board four Section 3060 termination protests
5 against FCA. The protests state that the September 5, 2017 notices from FCA were received by Porter "on
6 or after September 14, 2017." One protest was filed for each franchise as follows:

7 (1) Protest No. PR-2534-17 (Chrysler).

8 (2) Protest No. PR-2535-17 (Dodge).

9 (3) Protest No. PR-2536-17 (Jeep).

10 (4) Protest No. PR-2537-17 (RAM).

11 5. The protests are nearly identical for each franchise and the four protests were consolidated
12 on October 10, 2017. Porter denied every allegation contained in the written notices of termination and
13 contended it is "a new motor vehicle dealer selling and servicing [Chrysler, Dodge, Jeep and RAM] brand
14 motor vehicles, and is located at 13411 Mono Way, Sonora, California 95370." (Protests filed September
15 22, 2017, p. 1, lines 19-20)

16 6. Protestant contends Respondent does not have good cause to terminate the franchises
17 because:

18 "(a) Protestant has transacted and is transacting an adequate amount of FCA business compared
19 to the business available to it.

20 (b) Protestant has made all necessary investments and incurred all necessary obligations to
21 perform its part of the franchise[s].

22 (c) Protestant has made a substantial and permanent investment in the dealership.

23 (d) It would be injurious to the public welfare for the franchise[s] to be terminated ...

24 (e) Protestant has adequate motor vehicle sales and service facilities, equipment, vehicle parts,
25 and qualified service personnel to reasonably provide for the needs of FCA consumers and owners in the
26 market area and is rendering adequate services to the public.

27 (f) Protestant has fulfilled the warranty obligations to be performed by it.

28 (g) The extent of any failure of Protestant to comply with the terms of the franchise

1 agreement[s] is immaterial.” (Protests filed September 22, 2017, p. 2, lines 3-19)

2 7. On October 20, 2017, FCA filed a Motion to Dismiss Protests contending that the protests
3 failed to comply with Section 585(b) of the Board’s regulations in that they were not responsive to the
4 specific grounds set forth in the notices of termination and did not set forth in clear language Porter’s
5 factual contentions with respect to the matters referenced in the notices. (October 20, 2017, Motion to
6 Dismiss, p. 3, lines 4-6) This matter was briefed and oral arguments were presented at a hearing on
7 November 9, 2017, before ALJ Skrocki.

8 8. ALJ Skrocki denied FCA’s October 20, 2017 motion because there were no affidavits,
9 declarations or other evidence presented in support of the motion that would factually establish the
10 grounds for termination as stated in the notices.

11 9. On February 15, 2018, FCA issued 60-day notices of termination³ for each franchise
12 (Chrysler, Dodge, Jeep and RAM). These notices contained six additional grounds for termination:

13 (1) Porter’s failure to maintain its license necessary to fulfill its obligations under the Dealer
14 Agreements;

15 (2) Porter’s failure to maintain adequate net worth;

16 (3) Porter’s failure to timely submit financial statements;

17 (4) The impairment of Porter’s financial standing and the financial standing of its owners
18 and/or executives; the insolvency of Porter;

19 (5) Porter’s failure to meet its advertising and sales promotion obligations; and

20 (6) Porter’s failure to meet its service personnel obligations.

21 10. The 60-day notices of February 15, 2018, go on to update and provide additional
22 information pertaining to the grounds identified in the 15-day notices issued on September 5, 2017, more
23 than 5 months earlier. As indicated in Exhibit 2 of the of the February 15, 2018 notices, Protestant had not
24 paid its rent and had defaulted in a lawsuit filed by the lessors of the dealership premises for non-payment
25 of rent and for eviction of Protestant from the premises. The notices also stated that Protestant and its
26 president Vincent E. Porter have been sued by Centerra Capitol (a creditor) for non-payment of loans in

27
28 ³ A 60-day notice of termination is issued when the statutory grounds allowing a 15-day notice do not apply.

1 excess of \$1 million (these loans were personally guaranteed by Mr. Porter). (February 15, 2018, 60-day
2 Notice of Termination - Chrysler Vehicle Line; and Exhibit 2 thereto) An additional lawsuit involving
3 Santander Bank, N.A. ("Santander") against Protestant and Mr. Porter seeks over \$2 million in unpaid
4 loans. (Exhibits 3 and 4 to the February 15, 2018, 60-day Notice of Termination - Chrysler Vehicle Line)

5 11. On March 14, 2018, Protestant filed four additional protests in regard to its Chrysler,
6 Dodge, Jeep and RAM franchises generally denying every allegation contained in the 60-day notices of
7 termination. The assertions in these protests of March 14, 2018, are identical to the assertions in the
8 protests of September 22, 2017, filed in response to the 15-day notices. The protests of March 14, 2018
9 were assigned the following numbers:

- 10 (1) Protest No. PR-2555-18 (Chrysler).
11 (2) Protest No. PR-2556-18 (Dodge).
12 (3) Protest No. PR-2557-18 (Jeep).
13 (4) Protest No. PR-2558-18 (RAM).

14 12. All eight protests were consolidated on March 27, 2018.

15 **PRESENT MOTION TO DISMISS PROTESTS, OR IN THE ALTERNATIVE,**
16 **FOR A FINDING OF GOOD CAUSE TO TERMINATE BASED**
ON UNCONTESTED EVIDENCE

17 **Respondent's Assertions in its Motion to Dismiss**

18 13. On March 30, 2018, Respondent filed a "Motion to Dismiss Protests or, in the Alternative,
19 for a Finding of Good Cause to Terminate Based on Uncontested Evidence."

20 14. This motion asserts two grounds for dismissal of the protests. The first ground is that of
21 mootness. The second is that, as a matter of law, the undisputed facts establish good cause to terminate
22 the franchises.

23 **The Claim of Mootness**

24 15. FCA contends that it is entitled to dismissal of these protests as moot for the following
25 reasons:

- 26 ■ Porter is not operating as a motor vehicle dealer. (Motion, p. 6, lines 15-16)
27 ■ Porter's dealer license has been suspended.
28 ■ Porter is "deeply in debt to both its landlord [Centerra Capitol, Inc. ("Centerra")] and its

1 lender Santander.”

- 2 ■ It is inconceivable that Porter could resume its operations much less at its Dealership
- 3 Premises.
- 4 ■ There is no relief that the Board could provide to restore Porter’s license, Dealership
- 5 Premises, or assets necessary to resume operations. (Motion, p. 8, lines 4-24)

6 **The Claim that the Undisputed Facts Establish Good Cause to Terminate the Franchises**

7 16. As stated above, FCA argues that because these protests are moot, the Board does not need
8 to determine whether FCA has good cause to terminate Porter’s Chrysler, Dodge, Jeep or RAM
9 franchises. However, alternatively, FCA contends that the “undisputed facts plainly show that FCA has
10 good cause to terminate Porter[’s FCA franchises] as a matter of law.” (Motion, p. 8, lines 26-28) Relying
11 on *Duarte & Witting, Inc. v. New Motor Vehicle Bd.* (2002) 104 Cal.App.4th 626, 637, Respondent argues
12 that the Board has the authority to dismiss a protest “where the undisputed facts demonstrate good cause
13 for franchise termination as a matter of law and afford no basis for preventing termination of the
14 franchise.” (Motion, p. 6, lines 4-6)

15 **Protestant’s Assertions in its Opposition**

16 17. Protestant filed its Opposition to the present motion on April 13, 2018. Protestant contends
17 that *Duarte* is factually distinguishable from the present matters since that case involved the
18 discontinuation of the production and distribution of Plymouth brand vehicles. The court, according to
19 Protestant, determined that the remedy sought by the dealer, that DaimlerChrysler be forced to continue
20 the production of Plymouth solely for the benefit of the single protesting dealer, is not within the authority
21 of the Board under its enabling statutes. Protestant contends that the remedy sought in these protests,
22 which is to sustain the protests, is specifically within the Board’s jurisdiction. (Opposition, p. 4, line 6-19)

23 18. Protestant maintains that there is no statutory or case law that supports the Board’s ability
24 to summarily find good cause to terminate Porter’s FCA franchises. (Opposition, p. 4, lines 24-25)
25 Section 3060 outlines the requirements to terminate a franchise: (1) statutory notice by the franchisor of
26 its intent to terminate the franchise, which was given in these protests; and (2) the Board finds that there is
27 “good cause for termination or refusal to continue, **following a hearing called pursuant to Section**
28 **3066,**” which has not occurred in these protests. (Bold in original; Opposition, p. 4, line 28; p. 5, lines 1-

1 4) Accordingly, Protestant contends that “the statutory process for a determination that ‘good cause’
2 exists for termination has not been met.” (Opposition, p. 5, lines 5-6)

3 19. Vincent Porter, general partner and dealer principal of Protestant, submitted a declaration
4 in opposition to the motion. Mr. Porter indicated that Protestant began to experience financial difficulties
5 in its operations in mid-to-late 2017; it fell behind in its monthly obligations to the landlord of the
6 dealership property and Santander, the wholesale flooring source for Protestant. (Declaration of Vincent
7 Porter, p. 1, lines 18-19, 24-26) Without any supporting documentation, Mr. Porter alleged that he has
8 “commitments from four (4) qualified dealers from Kentucky, Iowa, North Carolina and Florida who are
9 willing to infuse sufficient capital to enable the dealership to satisfy its financial obligations and remain
10 viable.” He is also negotiating with a fifth “well-qualified” California dealer. (Declaration of Vincent
11 Porter, p. 2, lines 8-12)

12 **Respondent’s Assertions in its Reply to the Opposition**

13 20. Respondent filed its Reply on April 20, 2018. According to Respondent, Mr. Porter “offers
14 no signed agreements, third-party affidavits, or other concrete evidence substantiating any prospect that
15 Porter has any ability to pay down its staggering debt, recapitalize, acquire a dealership premises and
16 inventory, and resume operations as a motor vehicle dealer.” (Reply, p. 2, lines 10-12) Respondent
17 contends that Mr. Porter’s declaration “does not contest any of the evidence presented by FCA US, let
18 alone any of the evidence about Porter’s failure to operate, its eviction, its unpaid debts, or its licensing.”
19 (Underline in original; Reply, p. 5, lines 3-4) No evidence relevant to the good cause factors is offered by
20 Porter. (Reply, p. 7, lines 12-13)

21 21. With regards to Porter’s interpretation of *Duarte*, Respondent contends Protestant is
22 reading that decision too narrowly; it is not limited to the notion that the Board offers no remedy in a
23 vehicle-line discontinuation protest. (Reply, p. 5, lines 26-27) *Duarte*, according to Respondent, applies to
24 the instant situation where the undisputed facts warrant termination. (Reply, p. 5, line 27; p. 6, lines 1-2)

25 **APPLICABLE LAW**

26 22. Section 331 provides in part as follows:

27 (a) A “franchise” is a written agreement between two or more persons having all of the
28 following conditions:

///

- (1) A commercial relationship of definite duration or continuing indefinite duration.
 - (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles ... manufactured or distributed by the franchisor or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.
 - (3) The franchisee constitutes a component of the franchisor's distribution system.
 - (4) The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor.
 - (5) The operation of a portion of the franchisee's business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories."
- ...

23. Section 3050 provides, in part, as follows:

The board shall do all of the following:

- ...
- (d) Hear and decide, within the limitations and in accordance with the procedure provided, a protest presented by a franchisee pursuant to Section 3060...
- ...

24. Section 3060 provides in part as follows:

(a) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless all of the following conditions are met:

(1) The franchisee and the board have received written notice from the franchisor as follows:

...

(2) Except as provided in Section 3050.7, the board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066....

(3) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

...

25. In determining whether there is good cause for terminating a franchise, Section 3061 requires the Board to "...take into consideration the existing circumstances, including, but not limited to, all of the following:

(a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(c) Permanency of the investment.

(d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(g) Extent of the franchisee's failure to comply with the terms of the franchise.

SALES AND SERVICE AGREEMENTS (FRANCHISES)

26. On February 25, 2016, Porter and FCA executed a Term Sales and Service Agreement ("franchise"⁴) for each of the four line-makes. At that time, Porter was doing business as Sonora Chrysler Dodge Jeep RAM at 13411 Mono Way, Sonora, California. The franchises include what are called "Additional Terms and Provisions."

27. The pertinent provisions of the franchise referenced in the Notices of Termination are:

11. SELLING, SERVICE, COMPLIANCE, FACILITIES AND LOCATION, FINANCES, PERSONNEL AND SIGNAGE

(a) SELLING

DEALER shall use its best efforts to promote energetically and sell (which includes leasing) aggressively and effectively at retail ... each and every model of FCA US vehicle ... and FCA US vehicle parts, accessories and other FCA US products and services to customers wherever they may be located. ... DEALER will sell at retail the number of new FCA US vehicles necessary to fulfill DEALER's Minimum Sales Responsibility for each passenger car line or truck line represented by the vehicles listed on the Motor Vehicle Addendum...

...

(b) SERVICE

DEALER shall service FCA US vehicles actively and effectively and provide and maintain, for servicing FCA US vehicles, adequate facilities equipped with the basic tools common to the trade and with special tools and equipment peculiar to FCA US products and necessary for servicing and repairing specified FCA US vehicles properly, efficiently, and competitively. ...

...

(c) FINANCES

⁴ It is noted that the "franchise", as defined in Section 331(a), is the "written agreement" as compared to the physical dealership necessary for the sales and service of the vehicles that are within the scope of the franchise. As discussed herein, although the franchises, the written agreements, continue to exist, the dealership no longer exists.

DEALER shall maintain and employ in connection with DEALER's business such net working capital, net worth, and wholesale credit and retail financing arrangements necessary for DEALER to carry out successfully DEALER's undertakings pursuant to this Agreement. ...

(f) PERSONNEL

DEALER shall employ in accordance with the volume of DEALER's business such number of competent technicians in DEALER's repair shops as may be required to assure prompt, satisfactory and competitive customer service for all owners of FCA US vehicles who may request such service from (sic) DEALER. ...

(g) SIGNAGE

DEALER shall display and maintain brand signs, fascia and other signage in compliance with the policies and guidelines of FCA US LLC's Dealership Identification Program...

12. ADVERTISING

...

DEALER shall engage in advertising and sales promotion programs and shall use effective showroom displays to help fulfill DEALER's responsibility to promote FCA US products and services vigorously and aggressively. ...

13. REPORTS, RECORDS AND BUSINESS SYSTEMS

DEALER shall submit to FCA US for confidential use by FCA US and its affiliates ... complete and accurate reports of sales and stocks of new and used vehicles on hand and other reports, including monthly financial statements and operating reports.
...

28. TERMINATION

...

(b) FCA US may terminate this Agreement on not less than sixty (60) days written notice for the following reasons:

...

(ii) the failure of DEALER to perform fully any of DEALER's undertakings or obligations as set forth in this Agreement including, but not without limiting the generality of the foregoing, the undertakings and obligations set forth in Paragraphs 11(b) through 11(g) or Paragraphs 12, 13, 14, 23, 26(c) or 35 of this Agreement, or

...

(ix) impairment of the reputation or financial standing of DEALER or any of DEALER's owners or executives or discovery by FCA US of any facts existing prior to or at the time of signing this Agreement, which, in FCA US's opinion, tend to impair such reputation or financial standing, or

...

(xiii) the notification of termination or termination, for any reason, of any other

1 FCA US LLC Dealer Agreement(s) which may be in effect between DEALER and FCA
2 US LLC ...

3 (c) Notwithstanding the provisions above, this Agreement will terminate automatically
4 without notice from either party on:

5 (iv) the insolvency of DEALER ..., or

6 ...
7 (vi) the failure of DEALER to fully conduct its Dealership Operations for seven
8 (7) consecutive business days, or

9 (vii) the loss, termination or expiration of any license or permit required by law
10 for DEALER to perform DEALER's obligations under this Agreement or otherwise
11 conduct business as a new vehicle dealer for FCA US products.

12 ...
13 (Wong Declaration, Exh. A)⁵

14 **FACTS THAT HAVE BEEN ESTABLISHED BY FCA AND**
15 **NOT DISPUTED BY PORTER**

16 **Porter Is No Longer in Possession of the Realty Upon Which the Dealership Was Located**

17 28. Porter operated its dealership at 13411 Mono Way, Sonoma, California as the lessee of the
18 property. Porter ceased making rental payments starting with the payment due in April 2017 (over a year
19 ago). The landlord brought suit seeking to evict Porter from the premises. Porter did not respond to the
20 suit. On July 31, 2017, the Superior Court in Tuolumne County entered a default judgment and on August
21 4, 2017, issued a Writ of Possession. On August 23, 2017, the Sheriff issued an eviction/restoration notice
22 restoring possession of the leased premises to the landlord and on that same day the landlord changed the
23 locks on the premises. (Draper Declaration, p. 1, lines 26-27; p. 2, lines 1-12)⁶

24 29. Since August 2017, Santander, Porter's financing institution, has posted an "around the
25 clock" security guard on the premises. (Draper Declaration, p. 2, lines 13-14)

26 30. No one representing Porter has contacted the landlord's property manager seeking to
27 resolve the debts or reopen the dealership. (Draper Declaration, p. 2, lines 18-25)

28 ⁵ The Declaration of Eric Wong, a Dealer Network Manager in FCA's California Business Center, is attached as Exhibit 4 to the February 15, 2018 notices of termination and as Exhibit 3 to the Motion.

⁶ The Declaration of Paul B. Draper, Chief Executive Officer and Secretary, Centerra Capital, Inc. (Porter's landlord and property manager) is Exhibit 2 to the February 15, 2018 notices of termination and Exhibit 2 to the Motion.

1 **The Failure of Porter to Conduct Dealership Operations**

2 31. The last sale of a vehicle by Porter occurred in May 2017. (Wong Declaration, p. 7, line 1)

3 32. The last part order submitted by Porter was in July 2017. (Wong Declaration, p. 6, line 23)

4 33. The last claim for warranty service submitted by Porter was dated in August 2017. (Wong
5 Declaration, p. 6, lines 19-20)

6 34. Porter has conducted no operations at the dealership since at least August 2017. (Wong
7 Declaration, p. 7, line 3-4)

8 35. As of at least October 2017, Porter's occupational license as a new motor vehicle dealer is
9 designated by the DMV as "Not Valid". (Motion, Exh. 3)

10 **Porter's Financial Situation**

11 36. In addition to the unpaid rent, Porter also owes over \$1,000,000 for other loans made by
12 the property manager (Centerra Capitol, Inc.) to Porter and for which Mr. Porter is a personal guarantor.
13 The property manager has filed suit against Porter and Mr. Porter on these unpaid loans. (Draper
14 Declaration,, p. 2, lines 26-27; p. 3, lines 1-2)

15 37. Santander, Porter's flooring lender, in October 2017, filed suit against Porter for over \$3
16 million in debt and on March 26, 2018, the court entered a Default Judgment for Santander. The judgment
17 ordered Porter to turn over all new and used vehicle inventory, parts, service equipment, etc., and
18 authorized Santander to take possession of all other assets of Porter. The court found Porter solely liable
19 for over \$1.5 million under its contract with Santander and jointly and severally liable for over \$3 million.
20 (Motion, Exhs. 5-7)

21 **ANALYSIS OF THE CLAIM OF MOOTNESS**

22 38. FCA asserts that "Porter Cannot Resume Dealership Operations, So the Protests Are
23 Moot." (Motion, page 6, line 14)

24 39. There is no dispute that the Board has the inherent power to dismiss a protest (without a
25 hearing on the merits of the protest) if the Board lacks jurisdiction over the parties or the protest. This
26 may be due to the absence of a "franchise" (as defined in the Vehicle Code) or because the protest was not
27 timely filed.

28 40. And there is no dispute that the Board has the implied power to summarily dismiss a

1 protest based upon the "existing circumstances" as was done by the Board and upheld in *Duarte*. In
2 *Duarte*, the franchise for Plymouth vehicles was being terminated as the franchisor (one of the prior
3 Chrysler entities) had ceased production of the Plymouth line-make.

4 41. In *Duarte*, a Board order sustaining the protest would have been a useless act and
5 meaningless as the franchisor could not, by order of the Board, resume providing Plymouth vehicles to
6 the franchisee. No order of the Board could prevent the loss of the Plymouth franchise and allow it to
7 continue to serve the public in that market area. This matter is similar to *Duarte*, in that no order of the
8 Board could result in Porter resuming operations. In the instant case, a Board order sustaining the protests
9 cannot prevent the loss of the Porter dealership for the Chrysler, Dodge, Jeep, and RAM line-makes,
10 cannot protect the investment of the owners and cannot allow the dealership to continue to serve the
11 public in the market area.

12 42. The purpose of Section 3060 is to protect franchisees from unjustified terminations⁷ of
13 franchises that would result in the loss of the dealerships and loss of the investment of the owners as well
14 as to protect the public's access to dealerships that are needed and doing a good job in providing for the
15 essential needs of the public. Although a franchise is merely the written agreement between the parties it
16 is essential for the franchisee to operate the dealership. Thus, in the case of an operating dealership, the
17 loss of the franchise would result in the loss of the dealership with all of the possible adverse
18 consequences that would flow from such a loss. Ordinarily, the dealership is in operation but will be
19 required to cease operation if the franchise is terminated. Here the situation is reversed. Although the
20 franchises, the written agreements, technically continue to exist, it is the dealership that has already been
21 lost and all of the adverse consequences that would flow from such a loss or closure have already
22 occurred and cannot be remedied or ameliorated by any order of the Board that FCA should not be
23 permitted to terminate the written agreements.

24 43. The Board is without power to do anything other than to overrule or sustain the protests.
25 Sustaining the protests would mean only that Respondent cannot terminate the franchises - the written

26
27 ⁷ There is nothing to indicate that FCA was responsible for the closure of the dealerships. And, as alleged by FCA and as will
28 be discussed below, there is no issue of whether the termination of the franchises is unjustified but rather that FCA has, as a
matter of law, good cause to terminate the franchises.

1 agreements that contain the contractual rights and duties of the parties. However, as stated above, ordering
2 that the contractual relationships continue to exist will not result in the re-opening of the dealership that
3 has been closed for an inordinate amount of time nor will requiring Respondent to maintain its contractual
4 relationship with Porter change the fact that Porter has no assets that would be lost by the termination of
5 the franchises. Porter has no location for the facilities from which to operate the dealership as it has been
6 judicially evicted from its leased premises, has lost its inventory and has lost all of its other assets to
7 Santander. In addition Porter no longer has the needed occupational license from the Department of
8 Motor Vehicles and is insolvent.⁸ Sustaining the protests and preventing the termination of the franchises
9 (the written agreements) will result in maintaining the status quo which will leave the parties and the
10 consuming public where they have been for the last year or more - with no Chrysler, or Dodge, or Jeep or
11 RAM sales being made, with no service available to the public, no warranty obligations of Respondent
12 being performed on customers' vehicles, and no benefits to the public that would accrue if the dealership
13 had been operational.

14 44. Sustaining the protests would not further the legislative intent of the statutes, which,
15 unless there is good cause to do so, is to prevent the loss of the benefit of the dealership to all of the
16 community interests affected by and dependent upon such an ongoing enterprise. The loss of the

17
18 ⁸ Section 1201(b)(23) of the California Uniform Commercial Code defines "insolvent" as follows:

- 19 (A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide
20 dispute;
21 (B) being unable to pay debts as they become due; or
22 (C) being insolvent within the meaning of federal bankruptcy law."

23 The "federal bankruptcy law" contains the following relevant language in its definition of "insolvent" (11 U.S.C. § 101(32)):

- 24 (A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum
25 of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of--
26 (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors;
27 and
28 (ii) property that may be exempted from property of the estate under section 522 of this title;
(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than
the aggregate of, at a fair valuation--
(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this
paragraph; and
(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of
the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; ...

Note that all of the definitions are stated in the disjunctive. Porter is insolvent under all three of the definitions as stated in the California Uniform Commercial Code.

dealership has already occurred and it occurred long before Respondent made its decision to issue the notices of termination of the franchises. Whether it was caused in whole or in part by circumstances beyond the control of the franchisee is irrelevant to the issues before the Board as the existing circumstances are that the dealership is closed, has been closed for an inordinate amount of time, and Porter (the franchisee) is insolvent with its leased premises back in the possession of the landlord and its other assets now owned by its creditor, Santander.

45. Sustaining the protests would be a meaningless act as Protestant is unable to function as a dealership operating as a franchisee as to any of the four line-makes. An order of the Board requiring Respondent to continue in its franchise relationships with Porter would not protect Porter from an unfair termination of its franchises nor would there be any protection of the interests of the public or otherwise further the intention of the legislature in the enactment of the statutes at issue.

46. In summary, FCA is correct in contending that the facts are such that there is no relief available before the Board and thus going to a hearing to determine whether there is good cause to terminate the franchises would be an exercise in futility. This is because Porter has not been, is not now and cannot in the future operate as a dealership conducting business as an FCA franchisee. Thus, a Board order that FCA may not terminate the franchises will not operate to further the legislative intent of requiring that a franchisor establish good cause to do so before allowing termination of the franchise operations thus protecting the public interest in preserving the dealership and maintaining its existence for serving the consuming public. Sustaining the protests in this situation will not prevent the loss of the dealerships, will not prevent any forfeiture to Porter or its owners, will not protect the employees, the community or the consuming public that would be served by the dealership.

47. Under the existing circumstances, deciding whether FCA has good cause to terminate the franchises is unneeded as a Board order sustaining the protests would not prevent the occurrence of all that has already occurred. All of the adverse effects of the loss of the Porter dealership have already occurred and no order of the Board will prevent such adverse effects or even mitigate against

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1 their result.⁹ There are no allegations that FCA was in any way the cause of, or responsible for, the
2 closure of the dealership.

3 **ANALYSIS OF THE CLAIM THAT THERE IS GOOD CAUSE TO**
4 **TERMINATE THE FRANCHISES AS A MATTER OF LAW**

5 48. FCA alleges that “The Uncontested Facts Demonstrate Good Cause to Terminate Porter as
6 a Matter of Law.” (Motion, page 8, line 25)

7 49. Section 3061 requires that the franchisor establish good cause to terminate the franchise
8 taking into consideration “the existing circumstances” including several specific areas of inquiry as will
9 be discussed.

10 50. The most important “existing circumstances” here are that the Porter dealership has ceased
11 all operations as a franchisee since August 2017 at the latest; the franchisee has been evicted from its
12 leased premises; the franchisee is insolvent; the franchisee no longer has a license to operate as a new
13 motor vehicle dealership; the franchisee’s investment in the dealership and its assets have already been
14 lost; termination of the franchises will not cause any additional loss to the franchisee; the consuming
15 public has not had an operating FCA dealership in the Sonora market for over a year; FCA will not be
16 able to appoint a new franchisee who will establish a new dealership for that market until the Porter
17 franchises (the written agreements) are terminated pursuant to an order of the Board; the franchisee no
18 longer has any employees; the franchisee is not contributing to the economy and is not generating any tax
19 receipts for the community.

20 51. FCA has provided more than adequate evidentiary documentation to support the above.
21 None of the above factual circumstances are in dispute.

22 52. The likelihood of Porter ever being able to reopen its dealership is so remote as to be
23 deemed impossible.

24 53. In addition to the general language of “existing circumstances,” Section 3061 also lists
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26 ⁹ Such a decision by the Board that the Section 3060 protests are moot as the dealership has ceased to operate should be
27 distinguished from a protest filed pursuant to Section 3065 subsequent to which the dealership may cease operations for
28 whatever reason. In a Section 3065 protest, the Board may still evaluate and pass upon whether the then franchisor complied
with the provisions of Section 3065 at the time of the events alleged in the Section 3065 protest even though the dealership
may be out of operation or has ceased to be a franchisee after the protest was filed.

seven more specific circumstances that must be considered in determining whether good cause exists for terminating a franchise. These circumstances and the facts as to them are as follows:

(a) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

54. Porter has not transacted any business since approximately August of 2017. Its last sale of a vehicle was in May 2017. It has ordered no parts from FCA since July 2017 and last submitted a claim for warranty service in August 2017. As stated by FCA, "[i]n short, Porter is conducting zero business." (Motion, p. 11, line 12; Wong Declaration, p. 6, lines 17-27 and p. 7, lines 1-2)

(b) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

55. Whatever investment may have been made by Porter was lost prior to the notices of termination. Its leasehold interest no longer exists as the lessor has been restored to possession by judicial order. Porter's interests in its inventory and other assets have also been lost. As evidenced by a default judgment in favor of Santander, Porter is in debt for millions of dollars that it is unable to repay. (Motion, page 11, lines 14-20)

(c) Permanency of the investment.

56. Whatever investment Porter may have had in the dealership no longer exists.

(d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

57. The harm to the public from the loss of the dealership had already occurred prior to the notices of termination and the termination of the franchises will not cause any additional injury to the public welfare. In fact, the termination of the franchises may benefit the public as it will allow FCA to replace the Porter dealership with another franchisee if it so desires.

(e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

58. Porter has no vehicle sales or service facilities, has no equipment or vehicle parts and has no employees. Thus, Porter has not been rendering any services to the public let alone services that are "adequate."

(f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

59. Porter has not been fulfilling any of FCA's warranty obligations and thus has failed in this regard.

(g) Extent of franchisee's failure to comply with the terms of the franchise.

60. It is undisputed that Porter has breached all of the terms of the franchises as stated above in paragraph 27.

61. It is again noted that FCA has submitted more than sufficient evidentiary documents to support the above and that Porter has submitted no documents or other evidence that would contest the above facts.

62. It is therefore determined that FCA has established as a matter of law that there is good cause to terminate the franchises of Porter as to each of the FCA franchises.


PROPOSED ORDER

After consideration of the pleadings, exhibits and oral arguments of counsel, it is hereby ordered that Respondent's "Motion to Dismiss Protests or, in the Alternative, for a Finding of Good Cause to Terminate Based on Uncontested Evidence" is granted. Protest Nos. PR-2534-17, PR-2535-17, PR-2536-17, PR-2537-17, PR-2555-18, PR-2556-18, PR-2557-18, and PR-2558-18 (*Porter Auto Group, L.P. v. FCA US LLC*) are overruled and dismissed with prejudice.

I hereby submit the foregoing which constitutes my proposed order in the above-entitled matters, as the result of a hearing before me, and I recommend this proposed order be adopted as the decision of the New Motor Vehicle Board.

DATED: June 7, 2018

By


ANTHONY M. SKROCKI
Administrative Law Judge

Jean Shiimoto, Director, DMV
Elizabeth (Lisa) G. Humphreys, Branch Chief
Occupational Licensing, DMV